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October 17, 2002

VIA UPS OVERNIGHT DELIVERY

Secretary
Missouri Public Service Commission
Data Center – 1st Floor
200 Madison Street
Jefferson City, Missouri 65102

RE: TC-2002-57, et al.

Dear Judge Roberts:

Enclosed please find an original and nine (9) copies of the Initial Brief of Ameritech Mobile Communications, Inc., CMT Partners, Ameritech Cellular and Verizon Wireless (collectively "Verizon Wireless") regarding the above-referenced proceeding. Please file this Brief in your usual manner and return the extra enclosed copy with the date of filing stamped thereon directly to the undersigned in the enclosed, self-addressed stamped envelope.

If you have any questions with respect to this filing, please contact me. Thank you for your attention to and assistance with this matter.

Very truly yours,

Thomas E. Pulliam

Thomas E. Pulliam

TEP\wh
Enclosures

cc: Charon Harris, Esq. (w/enclosure)
John Clampitt (w/enclosure)
Counsel of Record (w/enclosure)

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BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, Petitioners, v. Southwestern Bell Telephone Company, Southwestern Bell Wireless (Cingular), VoiceStream Wireless (Western Wireless), Aerial Communications, Inc., CMT Partners (Verizon Wireless), Sprint Spectrum LP, United States Cellular Corp., and Ameritech Mobile Communications, Inc., Respondents.	)	Case No. TC-2002-57, et al (consolidated)

INITIAL BRIEF OF AMERITECH MOBILE COMMUNICATIONS, INC., CMT PARTNERS, AMERITECH CELLULAR, AND VERIZON WIRELESS

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I. INTRODUCTION AND SUMMARY

This consolidated proceeding involves complaints filed by seven rural independent local exchange companies ("Petitioners")[1] concerning disputes between the Petitioners and various commercial mobile radio service providers[2] and local exchange carriers ("LECs") Southwestern Bell Telephone Company ("SWBT") and Sprint Missouri, Inc. ("Transiting Carriers") involving payment to Petitioners for the termination of traffic originated by the Wireless Carriers and transited by the Transiting Carriers to the Petitioners' respective networks. Petitioners are seeking a ruling by the Missouri Public Service Commission ("Commission") that Petitioners be compensated for all Wireless Carrier-originated traffic transited by a Transiting Carrier to the networks of the Petitioners at the Petitioners' respective intrastate access rates, except where Petitioners have a Commission-approved Wireless Termination Service Tariff in place. For this traffic, Petitioners ask the Commission to order the Wireless Carriers to pay Petitioners for traffic terminated after the effective date of the tariff at the rate set forth in the tariff. Petitioners seek to hold the Wireless Carriers primarily liable for this traffic. In the absence of payment from the Wireless Carriers, Petitioners seek a ruling that the Transiting Carriers shall block Wireless Carrier-originated traffic and be financially liable to the Petitioners for the traffic to the extent the Wireless Carriers do not pay Petitioners for the termination of the traffic.

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[1] Petitioners are Northeast Missouri Rural Telephone Company ("Northeast"), Modern Telecommunications Company ("Modern"), Chariton Valley Telephone Corporation ("Chariton Valley"), Mo-Kan Dial, Inc. ("Mo-Kan Dial"), Mid-Missouri Telephone Company ("Mid-Missouri"), Choctaw Telephone Company ("Choctaw") and Alma Telephone Company ("Alma"). Verizon Wireless and Petitioners Alma, Northeast, and Modern settled their disputes prior to the hearing in this docket. Petitioner Choctaw filed no claim against Verizon Wireless.

[2] The Respondent commercial mobile radio service providers are Southwestern Bell Wireless LLC d/b/a Cingular Wireless, Sprint Spectrum L.P. d/b/a Sprint PCS, Ameritech Mobile Communications, Inc. ("Ameritech Mobile"), Ameritech Cellular, CMT Partners, and Verizon Wireless (collectively "Verizon Wireless"), United States Cellular Corporation, Western Wireless Corporation, Aerial Communications, and VoiceStream Wireless Corporation (collectively "Wireless Carriers").

The Wireless Carriers and the Transiting Carriers allege that the Petitioners should be compensated at their intrastate access rates for interMTA traffic terminated to Petitioners' networks. For intraMTA traffic terminated prior to the date of the Commission's order in this proceeding, or the effective date of a Wireless Service Termination Tariff, the Wireless Carriers and the Transiting Carriers claim that Petitioners should be compensated by one of two methods: either pursuant to a negotiated rate based upon the forward-looking economic costs of Petitioners in providing the termination service or under the "bill and keep" methodology, as more specifically set forth in 47 C.F.R. §51.705(a). Transiting Carriers allege that they have no choice but to accept the transiting traffic in this case and deliver it to the Petitioners' networks and should not be held liable for performing their federally mandated obligations.

Petitioners have the burden of proof to establish their right to the relief sought in their respective Complaints. *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Comm'n of Mo.*, 806 S.W.2d 432 (Mo. App. 1991). The Commission must require the Petitioners to establish each and every element of their claim by substantial and competent evidence. If Petitioners fail to do so, the Commission must deny the relief sought in their Complaints. As an initial matter, the Commission does not need to reach the evidence presented in this proceeding to render a ruling. As demonstrated by the Wireless Carriers in previously filed Motions to Dismiss, sufficient legal grounds exist for the Commission to dismiss the claims of Petitioners.

Petitioners' claims fare no better if the Commission decides to examine the evidence in this case. As will be established herein, Petitioners have completely failed to establish each and every element necessary for the Commission to award them any relief under these consolidated Complaints. The numerous extraneous issues introduced into this proceeding should not distract the Commission from the fact that Petitioners have not established their claims by the substantial

and competent evidence necessary for the Commission to grant them relief. Indeed, the record shows: (1) erroneous allegations regarding the minutes of usage ("MOUs") allegedly transited by SWBT to the Petitioners, and schedules which conflict with, rather than support, allegations in the Complaints; (2) the absence of any evidence of how much of the wireless traffic transited by SWBT was within the same Major Trading Area ("intraMTA" traffic) and how much of this traffic crossed the MTA boundary which divides Missouri ("interMTA" traffic); (3) the uncertainty surrounding the rates to be applied to the traffic terminated, even if the MOUs were agreed upon; (4) the absence of any tariffed rates for the termination of this traffic for those Petitioners without wireless termination service tariffs; and (5) that those Petitioners which have wireless termination service tariffs have been paid for all traffic terminated to them under such tariffs. The Commission must therefore reject Petitioners' claims based on the utter lack of substantial and competent evidence to support them.

II. LEGAL BASES TO DISMISS COMPLAINTS

Numerous legal grounds already exist that require the Commission to dismiss the Petitioners' Complaints without reaching the merits of these cases.

A. Statute of Limitations.

Portions of the Petitioners' claims are barred by applicable statutes of limitation. Under 47 U.S.C. §415(a):

> (a) Recovery of charges by carrier
>
> All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.[3]

[3] For purposes of discussion of this point only, it is assumed that the access charges demanded by Petitioners for the termination of intraMTA traffic transited by SWBT constitute "lawful" charges for this traffic.

The Complaints of the Petitioners were filed at various times in the fall of 2001.[4] Each of the Petitioners' Complaints seeks payment for wireless traffic originated by the Wireless Carriers and transited by SWBT on and after February 5, 1998. Because Petitioners' claims are governed by this two-year statute of limitations, the Commission must dismiss those portions of Petitioners' respective claims that are based on allegedly uncompensated traffic transited more than two years prior to the date of the filing of their Complaints. *MFS Intern, Inc. v. International Telecom Ltd.*, 50 F.Supp. 2d 517 (E.D. Va. 1999).

B. The Commission Cannot Award Money Damages.

The Commission must dismiss those portions of Petitioners' Complaints that are not barred under federal law because they fail to state claims upon which relief can be granted. Each of the Petitioners' Complaints specifically requests the Commission to direct the Wireless Carriers "to pay and continue in the future to pay [Petitioners] for all traffic reported by SWBT as terminating from them"[5], and set forth in their respective Complaints the amounts allegedly due and owing from each of the Wireless Carriers. It is indisputable under Missouri law that the Commission has no authority to enter a money judgment:

> [The Commission] is an administrative body and not a court, and has no power to determine damages or award pecuniary relief. Straube v. Bowling Green Gas Co., 227 S.W.2d 666, 668-669 (Mo. 1950); Wilshire Const. Co. v. Union Elec. Co., 463 S.W.2d 903, 905 (Mo. 1971).

In the Matter of United Telephone Company of Missouri's Complaint Against Southwestern Bell Telephone Company for Failure to Pay United Its Terminating Access for Cellular-Originated Calls Which Are Terminated in United's Territory, TC-96-112, 6 Mo. P.S.C. 3d 224, 230

[4] Petitioners Northeast and Modern filed a joint Complaint on August 1, 2001; Chariton Valley Telephone Corporation filed its Complaint on October 2, 2001; Mo-Kan Dial filed its Complaint on October 11, 1991; Mid-Missouri filed its Complaint on August 21, 2001; Alma filed its Complaint on August 21, 2001; and Choctaw filed its Complaint on October 11, 1991.

[5] *See* the prayers for relief under the Complaints listed in footnote 4, *supra*, as amended.

(April 11, 1997); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466, 468 (Mo. App. 1980). Yet, this is precisely what Petitioners have done by asking the Commission to award them the amounts alleged in their Complaints and allegedly supported by the schedules to their direct testimony in this proceeding. Under long-standing Missouri law, the Commission is powerless to grant the relief sought by Petitioners. The Commission must therefore dismiss Petitioners' claims, to the extent not barred under applicable statutes of limitation, because they fail to state claims upon which the Commission can grant the relief requested.

C. Petitioners are Estopped by Prior Declarations Against Their Interests From Pursuing Their Complaints.

Substantial and competent evidence establishes that Petitioners should be estopped from pursuing their claims as pled under their respective Complaints. In the case styled *In the Matter of the Joint Complaint of Modern Telecommunications Co., Northeast Missouri Rural Telephone Co., Mid-Missouri Telephone Co., and MoKan Dial Inc. against Southwestern Bell Telephone Company for an Order Requiring Southwestern Bell to Pay for Wireless Originated Traffic Terminated to Modern, Northeast, Mid-Missouri, and MoKan Dial*, TC-2000-375, certain of the Petitioners commenced a complaint case against SWBT seeking payment from SWBT for the termination of wireless traffic to their exchanges without being paid their access rates for traffic – the identical issue being pursued in this proceeding. (Ex. 46). However, the complainants in that proceeding filed a Dismissal of Complaint Without Prejudice of Case No. TC-2000-375 less than 3 months after filing the complaint, dismissing their complaint for the following reasons:

> 7. The Complaint filed by the Complainants herein was premised upon the belief that there [*sic*] switched access rates, which were the only rates of Complainants which could lawfully be assessed to the traffic in question, were appropriate. ***Until the decision in TT-99-428 is finally reviewed,*** or until interconnection agreements containing rates approved by the Commission are in

> effect, ***there is now no rate which Complainants can contend in this proceeding applied to the traffic in question.***
>
> . . .
>
> 9. In light of the foregoing, there is no benefit or purpose in going forward with this Complaint until and unless new rate development efforts have been completed.

(Ex. 47 (emphasis supplied); Tr. 331). The Commission is well aware that the merits of their Report and Order issued in TT-99-428 et al. have never been "finally reviewed." In addition, the very pursuit of the instant Complaints establishes that there are no interconnection agreements between the Petitioners and Wireless Carriers. Although the reason that certain of the Petitioners dismissed their prior complaint remains unresolved, Petitioners nevertheless initiated the instant Complaints with all of the legal shortcomings to proceeding with their prior complaint still very much in existence.[6]

Nothing has changed since Petitioners dismissed their first complaint regarding the substantive issues addressed in this Complaint. Petitioners should be estopped from pursuing their claim hereunder for the reasons expressed by their own prior declarations.

D. Petitioners Suffer from "Unclean Hands."

Besides requesting the Commission to grant relief against the Wireless Carriers outside of its scope of authority and power, Petitioners have also sought an order from the Commission directing SWBT "to stop delivering to [Petitioners] traffic for which no compensation is being paid to [Petitioners]."[7] In pursuing equitable relief, Petitioners must have "clean hands." The substantial and competent evidence in this case establishes Petitioners cannot meet this criteria

[6] Petitioners' attempts to justify these new Complaints without a "final review" of the Commission's Report and Order (Tr. 332) fall woefully short and depend solely upon their indefensible position that SWBT is an interexchange carrier.

[7] *See* Footnote 5, *supra.*

(Tr. 1186-1187). Petitioners admit that with respect to the traffic in question, not one of them has paid the Wireless Carriers any compensation for traffic originated by Petitioners' customers and terminated to the customers of the Wireless Carriers. (Tr. 314, 444, 562-563). Verizon Wireless' witness confirmed that no party has compensated Verizon Wireless for the traffic in question. (Tr. 1121-1122). Petitioners are guilty of the very practice over which they cry "foul." The Commission cannot reward Petitioners in light of their behavior.

III. DISCUSSION

Assuming, *arguendo*, that Petitioners' claims are not dismissed by the Commission for one or more of the reasons recited above, the substantial and competent evidence in this proceeding establishes beyond question that Petitioners have failed to sustain their burden of proof with respect to the elements they must prove for the Commission to grant them appropriate relief.

For Petitioners to be successful in their Complaints, they must establish each of the following by substantial and competent evidence:

- The "jurisdictional nature" of all such MOUs – i.e. how many MOUs are intraMTA in nature and how many MOUs are interMTA in nature;
- The exact number of MOUs transited by SWBT on behalf of each Wireless Carrier for each category;
- The rate to be charged each category of MOU; and
- Proper credit for all payments previously received from the Wireless Carriers.

If Petitioners are unable to establish, by competent and substantial evidence, each and every one of the aforementioned items, their claims must fail and the Commission cannot grant them any relief. As will be shown below, the substantial and competent evidence in the record establishes beyond rational contention that Petitioners have failed to fulfill their burdens of proof.

A. Unknown "Jurisdictional Nature" of the Transited Traffic.

In a proceeding where agreement among all parties was rare, one fact upon which all parties agree is that no one knows how many of the MOUs in question are intraMTA and how many are interMTA. (Tr. 1065, 1096, 1126-27, 1135). A precise determination of the breakdown of MOUs between intraMTA and interMTA traffic is critical to Petitioners' satisfaction of their burden of proof because without this breakdown, the Commission has no way of knowing how much is allegedly owed by the Wireless Carriers. This is because under well-settled law, access rates cannot be charged for wireless traffic that originates and terminates within the same Major Trading Area – i.e. intraMTA traffic:

> traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges[8]

Although there was much speculation about how much of the wireless-originated traffic is one type or the other (Tr. 1098-1099; 1204-1205; 1215-1217), there is no evidence at all in the record, much less substantial and competent evidence, establishing any specific amount of intraMTA or interMTA traffic transited by SWBT to Petitioners' networks.

B. Questionable MOU Determinations.

Hearings in this proceeding uncovered serious questions as to the validity of the MOU figures upon which Petitioners base their claims. For example, the 1st Amended Complaint of Mid-Missouri alleges that Ameritech Mobile originated 394,594 minutes for which they have allegedly received no compensation (1st Amended Complaint of Mid-Missouri Telephone Company, ¶11d; Tr. 298). Yet the direct testimony filed in support of said 1st

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[8] *In Re Implementation of the Local Competition Provisions in The Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC No. 96-325, 11 FCC Rcd 15499 (1996), ¶1036; See also *In the Matter of Alma Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2*, TT-99-428, et al., Amended Report and Order, p. 16 (April 9, 2002).

Amended Complaint shows only 327,675 minutes allegedly originated by Ameritech Mobile for which Mid-Missouri has allegedly received no compensation. (Ex. 1, Schedule 1). Although Mid-Missouri witness Jones offered "updated data" in support of why Mid-Missouri's evidence only substantiated 85% of its claim (Tr. 299), closer analysis reveals that this explanation is sorely lacking. The data for Ameritech Mobile did not change at all from the time the 1st Amended Complaint was filed and the time Schedule 1 of the direct testimony was filed. All of this data was contained in the CTUSR reports that SWBT submitted to Mid-Missouri, and Mid-Missouri possessed the CTUSR reports at the time it filed its 1st Amended Complaint. In reality, no one really knows where this 15% difference came from or why it occurred. Moreover, when confronted with the documentation which allegedly supported the 327,675 MOU figure, Mid-Missouri witness Jones recanted the credibility and validity of his own schedule when it was established in cross-examination that the MOUs transited by SWBT on behalf of Ameritech Mobile to Mid-Missouri's network facilities could, at most, be 302,002 MOUs (Tr. 722), a difference of over 20% from the amount pled in Mid-Missouri's 1st Amended Complaint. Mid-Missouri witness Jones similarly renounced MOU figures associated with Mid-Missouri's allegations against CMT Partners. (Tr. 722).

Similar credibility problems plague the evidence of other Petitioners. In the direct testimony of Mo-Kan Dial witness Stowell, Mo-Kan claims it is owed $126.01 from Ameritech Mobile for traffic terminated between February, 2001 and December, 2001. (Ex. 7, p. 8, l. 15-22). Yet Schedule 1 to witness Stowell's direct testimony shows that this $126.01 was based upon zero MOUs. (Ex. 7, Schedule 1). When cross-examined about this discrepancy, Mo-Kan Dial witness Stowell could provide no explanation. (Tr. 562). Errors of a similar nature were established during cross-examination of Chariton Valley witness Mr. Biere. (Tr. 439-443).

This unrefuted evidence places into serious question the validity of: (1) any of the MOU calculations made by any of the Petitioners in their various Complaints, and (2) the evidence submitted by Petitioners in support thereof. To rule that Petitioners have established the MOUs upon which their claims are based by substantial and competent evidence ignores the unrefuted evidence in the record.

C. Non-Existent or Questionable Rates.

By law,[9] each category of traffic at issue in this proceeding (i.e. – intraMTA and interMTA) must be charged a different rate. All of the parties to the proceeding agree that Petitioners' can impose "access rates" for the termination of interMTA traffic. Assuming, *arguendo*, that the substantial and competent evidence in this proceeding could establish both an appropriate MOU figure and the breakdown of such MOUs between interMTA traffic and intraMTA traffic, which as demonstrated above they do not, application of the "access rates" provided in this record produces conflicting figures as to amounts allegedly due and owing from the Wireless Carriers. Examples of the problems arising with the rates in the record are set forth on Attachment 1 to this Initial Brief. The examples set forth on Attachment 1 establish that the only "access rates" in the record do not produce figures that match the allegations of Petitioners. To say the least, the record is sorely lacking in any competent or substantial evidence to establish the basis for these "access rates" that Petitioners seek to apply to interMTA traffic in this proceeding.

Substantial problems also exist for Petitioners in their failure to establish a valid rate for intraMTA traffic. No evidence establishes what rate Petitioners should be permitted to charge for intraMTA traffic transited by SWBT on behalf of the Wireless Carriers. This is not

[9] *See* paragraph A of Section III , *supra*.

surprising because it is the misguided position of Petitioners that they are entitled to be paid their "access rates" for such traffic. State and federal law prohibit the imposition of access rates on intraMTA traffic transited by a LEC such as SWBT.[10] Petitioners have proposed no other rate, meaning that there is no lawful rate in the record that Petitioners can apply to intraMTA traffic.

Given that Petitioners have not introduced a valid rate to apply to intraMTA traffic, the Commission cannot simply create one to apply retrospectively. Missouri law is clear that the Commission is prohibited from establishing a rate for a service rendered by a regulated public utility and applying that rate to services rendered in the past.[11] Yet this is exactly what Staff is recommending to the Commission in this proceeding. Staff witness Scheperle advocates the creation of a brand new, never-before-seen rate for traffic already terminated by picking and choosing certain elements of Petitioners' access rates on file with the Commission and forming a new, previously non-existent rate from a combination of these particular elements. (Ex. 12, p. 10; Tr. 1134). Staff's proposal, if accepted by the Commission, essentially guts the bar under Missouri law against retroactive ratemaking. The record is clear that there is no rate that the Commission can use to apply to the termination of intraMTA traffic transited by SWBT to any of the Petitioners. Staff's recommendation does not withstand application of long-standing, unchallenged Missouri law prohibiting retroactive ratemaking.

The only legal recourse available to Petitioners for additional compensation for past intraMTA traffic is if the Petitioners would negotiate reciprocal compensation agreements with the Wireless Carriers containing forward looking, cost-based rates which the Wireless Carriers agree to apply to this traffic. No other alternative exists which would withstand judicial scrutiny.

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[10] *See* paragraph A of Section III, *supra.*

[11] *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission of Missouri*, 585 S.W.2d 41, 59 (Mo. banc 1979).

D. SWBT is not an Interexchange Carrier When Acting as a Transiting Carrier.

During cross examination, Mid-Missouri's witness Jones admitted that if the Commission does not rule that SWBT is an interexchange carrier for purposes of the Wireless Carrier traffic it transits to the networks of the Petitioners, then Petitioners' position regarding the payment of access for intraMTA traffic fails. (Tr. 333-334). The substantial and competent evidence in the record establishes that SWBT is *not* an interexchange carrier for purposes of the traffic it transits. (Ex. 13, pp. 12-14; Tr. 1139; Tr. 1194-1197; Ex. 19, pp. 6-7). The evidence also establishes that SWBT is only certificated as a LEC, and not a certificated interexchange carrier. (Ex. 13, p. 12). Moreover, the evidence establishes that transiting LECs like SWBT operate differently from interexchange carriers with respect to areas such as establishing common trunk groups (Tr. 1194-1197) and the services provided in carrying a call (SWBT merely transports the call to the Petitioners' network, while an interexchange carrier transports *and terminates* the call on an end-to-end basis). (Ex. 13, pp. 12-14). LECs like SWBT are obligated by law to offer this transiting service and must accept this traffic. (Ex. 13, p. 14). Interexchange carriers are not similarly obligated. The record establishes that SWBT is not an interexchange carrier for purposes of the traffic that it carries as a transiting carrier. Therefore, Petitioners' claims must, by their very admission, fail.

E. Conclusion.

For Petitioners to prevail in their claims, they must establish each element of their claims as to each Wireless Carrier by substantial and competent evidence. The record in this case establishes beyond question that Petitioners have failed to satisfy their burden of proof. The substantial and competent evidence in the record cannot justify a ruling by the Commission granting the relief sought by Petitioners. As such, based on the record in this proceeding, the

Commission must deny the relief sought by Petitioners and rule in favor of SWBT, Sprint, and the Wireless Carriers.

IV. THE COMMISSION SHOULD REJECT CERTAIN OTHER ISSUES AS IRRELEVANT

Resolution of the issues discussed in Section III hereof fully and completely disposes of the merits in these consolidated complaint cases. The Commission need not make any determination about any other issues in order to fully resolve this case on the merits. The Commission should therefore find Petitioners' arguments related to these issues unavailing.

A. SWBT Wireless Interconnection Tariff (P.S.C. Mo. No. 40).

The substantial and competent evidence in the record establishes that none of the traffic at issue in this proceeding is transited by SWBT pursuant to its wireless interconnection tariff (P.S.C. Mo. No. 40). (Ex. 13, p. 16; Ex. 15, p. 10; Tr. 970). Moreover, as the record establishes, no Wireless Carrier appeared in Case No. TT-97-524 to address or contest the proposed modifications to this tariff regarding SWBT's transiting function. (Ex. 45, p. 1). This is not surprising because all of the Wireless Carriers in this proceeding have direct interconnection agreements with SWBT and send their traffic to SWBT via their interconnection agreements rather than pursuant to SWBT's wireless interconnection tariff. (Ex. 13, p. 16). Because SWBT transited none of the traffic at issue in this proceeding pursuant to this tariff, its terms, conditions, and anything surrounding it are wholly and completely irrelevant to the Commission's determination of the real issues at hand.

B. Negotiation of Interconnection Agreements.

The record in this case unequivocally establishes that the Wireless Carriers have repeatedly pursued interconnection agreements with Petitioners. (Ex. 17, Schedules E, F, G, H, I;

Ex. 19, Schedule 1; Tr. 1055). There is no evidence in the record that the Petitioners ever initiated negotiations of interconnection agreements with the Wireless Carriers. The record is replete with example after example of the attempts the Wireless Carriers have made to enter into interconnection agreements with Petitioners. (Id.) The record is also clear that the Wireless Carriers were repeatedly rebuffed in their attempts to commence negotiations and/or continue them by the bad faith positions taken by Petitioners. For example, Petitioners: predicated the commencement of negotiations upon the payment of illegal access charges for intraMTA traffic terminated until an agreement was reached (Ex. 15, p. 13; Ex. 19, Schedule 1); refused to discuss indirect interconnection even though this type of interconnection is permitted under federal law (47 U.S.C. §251(a)(1); Ex. 17, Sch. F); and took inconsistent positions on the issue of negotiating separate agreements for each Petitioner versus as a group (*See and compare* Ex. 45, p. 3 *with* Ex. 19, Schedule 1, p. 2; Tr. 1186-1187). The substantial and competent evidence should lay permanently to rest any notion that the past failure to negotiate interconnection agreements is somehow the fault of the Wireless Carriers; to the contrary, the substantial and competent evidence in this proceeding leaves no doubt that it is the Petitioners who have engaged in bad faith regarding Wireless Carriers' attempts to negotiate interconnect agreements, and it is Petitioners who need to be given the incentive by this Commission to engage in good faith, fruitful negotiations.[12]

[12] Petitioners will have no incentive to negotiate interconnection agreements with the Wireless Carriers if the Commission permits Petitioners to charge access rates for intraMTA traffic; furthermore, such an order would likely cause every ILEC in Missouri with a Wireless Termination Service Tariff to immediately withdraw such tariff if they knew they could get away with charging their higher access rates for the termination of intraMTA traffic versus their lower, tariffed rate. (Ex. 45, p. 20; Ex. 15, p. 18; Ex. 19, p. 11; Tr. 752-758).

C. SWBT/Wireless Carrier Interconnection Agreements.

Petitioners have attempted to argue that the Wireless Carriers have taken a series of alleged missteps in connection with their respective interconnection agreements with SWBT. (Tr. 1084-1087). Besides being irrelevant to the issues at hand and having no impact upon Petitioners' failure to satisfy their burdens of proof, such attempts by Petitioners are without merit. First, Petitioners have no grounds to seek enforcement of the interconnection agreements. Section 18.5 of the Interconnection Agreement between Ameritech Mobile and SWBT provides:

> This Agreement shall not provide any non-party with any remedy, claim, cause of action or other rights.

(Ex. 30, p. 31). Identical language can be found in the interconnection agreement between CMT Partners and SWBT. (Ex. 31, p. 32). Thus, whether the Wireless Carrier did or did not comply with the express terms of an interconnection agreement is irrelevant given the standing of the Petitioners as non-parties to the agreement.

In any event, the Wireless Carriers did not violate the terms of the interconnection agreements with SWBT. For example, Ameritech Mobile's interconnection agreement with SWBT obligates Ameritech Mobile not to send traffic to SWBT for termination to a third-party provider's network unless and until Ameritech Mobile had an interchange agreement with the third-party provider. (Ex. 30, p. 10). However, this prohibition cannot be analyzed solely within the context of the language of the Agreement, but must be read in connection with the facts, circumstances, and assumptions surrounding its implementation. When negotiating and agreeing to this language, the Wireless Carriers no doubt expected that Petitioners would negotiate the terms and conditions of the separate agreements referenced in Section 3 of the SWBT interconnection agreements in good faith. The Commission expected as much. (Ex. 45, p. 13; Tr. 327). However, what nobody anticipated was the bad faith posture repeatedly taken by

Petitioners in negotiations. (*See* Paragraph B of Section IV, *supra*). In addition, the evidence in this case establishes that upon the failure of negotiations, Verizon Wireless moved its traffic from transiting through SWBT pursuant to their interconnection agreement to being carried by interexchange carriers. (Ex. 19, p. 10).

The negotiating posture of Petitioners made compliance with certain aspects of the interconnection agreements impossible. Given Petitioners' bad faith negotiations, they should not be rewarded for their intransigence by a negative finding by the Commission regarding the Wireless Carriers' activities for sending traffic without agreements in place.

V. COMMISSON ISSUES

During the course of the hearing, the Commission asked the parties to brief a number of issues (Tr. 754-755; 1104). Verizon Wireless responds herein with its position related to these issues.

A. Can the Commission order Petitioners and the Wireless Carriers to enter into negotiations to establish an interconnection agreement? (Tr. 754)

In the context of a complaint case, the Commission has the power, under its rules, to order the parties to mediate before any further proceedings in the case (4 C.S.R. 240-2.125(2)(A)). It also has the power to order parties to engage in alternative dispute resolution with a commission authorized member (4 C.S.R. 240-2.125(3)). The record in this proceeding establishes that the Wireless Carriers repeatedly sought to mediate the issues with Petitioners, and that Petitioners repeatedly and universally rejected these mediation requests of the Wireless Carriers.

Within the context of these mediations, discussions about the terms and conditions of interconnection agreements would no doubt occur. In fact, the record shows that the Wireless

Carriers have repeatedly stated that they would be willing to negotiate interconnection agreements. (Tr. 1071, 1100, 1209). But as shown herein (*see* paragraph B of Section IV, *supra*), the Petitioners have refused to negotiate, or have negotiated in bad faith.

Only "local exchange carriers" have the *duty* to establish reciprocal compensation arrangements for the transport and termination of traffic under 47 U.S.C. §251(b)(5). The Wireless Carriers are not local exchange carriers as that term is defined under 47 U.S.C. §153(26) and in the FCC's First Report and Order on Local Competition.[13] Moreover, the Wireless Carriers fall outside of the definition of "telecommunications companies" over which the Commission can exercise jurisdiction under Missouri law. (*See* RSMo. §386.020(53)(c)). Thus while the Commission has no apparent legal authority or grounds to *order* the Wireless Carriers to enter into negotiations to establish an interconnection agreement with the Petitioners, through mediation directives, the Commission can put the parties in a position where negotiations would undoubtedly occur, and Verizon Wireless would not oppose such order in the context of this particular complaint case. However, whether such mediation efforts would constitute a bonafide request to negotiate such an agreement to start the clock running in connection with the availability of the arbitration remedies under the Telecommunications Act of 1996 ("TA 96") is not at all certain.

B. Can the Commission order the Petitioners and the Wireless Carriers to enter into interconnection agreements? (Tr. 754)

As noted above, because the Wireless Carriers are not "local exchange carriers" having the duty to establish reciprocal compensation arrangements under 47 U.S.C. §251(b)(5), and

[13] *In Re Implementation of the Local Competition Provisions in The Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC No. 96-325, 11 FCC Rcd 15499 (1996), ¶1004.

because the Wireless Carriers are not "telecommunications companies" over which the Missouri legislature has given the Commission jurisdiction, the Commission cannot order the Wireless Carriers to negotiate such agreements, although mediation/alternative dispute avenues of which the Commission may avail itself could have the same effect. By logical extension, it naturally follows that the Commission cannot unilaterally order the Petitioners and the Wireless Carriers to enter into interconnection agreements.

Under TA 96, the Commission's role in facilitating interconnection between the Petitioners and the Wireless Carriers is to arbitrate disputes upon request of one of the parties. If the Petitioners (as local exchange carriers (47 U.S.C. § 153(26)) and the Wireless Carriers, each negotiating in good faith, fail to reach agreement upon the terms and conditions of an interconnection agreement, one of the parties to the negotiations has the right, within a statutorily-established period of time, to petition the Commission to arbitrate any open issues in the sought-after agreement. Thus, only pursuant to a valid arbitration under TA 96 would the Commission have the right to impose an interconnection agreement upon a Petitioner and a Wireless Carrier. Such right of the Commission only arises after the affirmative act (i.e. – a petition seeking arbitration) by one of the parties to the proposed interconnection agreement, and cannot be unilaterally exercised by the Commission.

C. Can the Commission order a Petitioner to adopt a Wireless Termination Service Tariff? (Tr. 755)

Local exchange carriers like Petitioners have decided not to file wireless termination service tariffs such as those that have been filed with the Commission by other rural ILECs. Although the Commission might find it appealing to order Petitioners to file wireless termination

service tariffs to dispense with the issues in this case, the Commission should reject this approach.

The power to order a Petitioner to create and file a Wireless Termination Service Tariff falls outside of the powers and authorities delegated to the Commission pursuant to its enabling statutes. Although the Commission has broad powers to regulate the companies that fall under its jurisdiction, such power does not give the Commission the right to dictate the manner in which a regulated company shall conduct its business (*See State v. Bonacker*, 906 S.W.2d 896, 899 (Mo. App. 1995); *State ex rel. Laclede Gas Co. v. P.S.C.*, 600 S.W.2d 222, 228). As the courts have found:

> [t]he commission is purely a creature of statute, and its powers are limited to those conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted. *State ex rel. Utility Consumers Council, etc. v. P.S.C.*, 585 S.W.2d 41, 49 (Mo. banc 1979). "[N]either convenience, expediency or necessity are proper matters for consideration in the determination of 'whether or not an act of the commission is authorized by the statute.' *State ex rel. Kansas City v. Public Service Commission*, 257 S.W.2d 462 (banc 1923)" [I]t must be kept in mind that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." *State v. Public Service Commission*, 406 S.W.2d 5, 11 (Mo. banc 1966).

State v. Bonacker, 906 S.W.2d 896, 899 (Mo. App. 1995).[14]

By unilaterally ordering a Petitioner to file a Wireless Termination Service Tariff, the Commission would substitute its own analysis and judgment about future payments to the company for wireless traffic terminated to the exchanges of the company, and the terms and conditions of such service, for the reasoning and judgment of the company's management. Such a substitution is impermissible under Missouri law.

[14] *See also State ex rel. Laclede Gas Co. v. P.S.C.*, 600 S.W.2d 222, 228 (Mo. App. 1980) ("It is obvious that the P.S.C. has no authority to take over the general management of any utility.").

Even if the Commission could order Petitioners to file wireless termination service tariffs, there are significant other reasons why the Commission should not do so. The Wireless Carriers and SWBT have appealed the legality and validity of the wireless termination service tariffs approved by the Commission in Case No. TT-2001-139 et al. to the Western District Court of Appeals of the State of Missouri (Docket No. WD60928). The issue is also being contested before the FCC.[15] Given that the legality of wireless termination tariffs is seriously in question, the Commission should not order Petitioners to file such tariffs.

D. Can the Commission unilaterally modify the tariffs of a telecommunications company? (Tr. 755)

Although some language found in Missouri statutes could be interpreted to support a position that the Commission could act unilaterally with respect to the operations of a telecommunications company, due process, prudence, and practicality would seem to dictate that the Commission not act unilaterally in modifying a regulated company's tariff without an opportunity for the affected company, and any other interested persons, to be heard.

For example, RSMo. §392.470.1 states, in part, as follows:

> 1. The Commission may impose any condition or conditions that it deems reasonable and necessary upon any company providing telecommunications service if such conditions are in the public interest and consistent with the provisions and purposes of this chapter ...

However, if the tariff modifications proposed by the Commission change a rate or charge for any competitive telecommunications service, or any classification or tariff provision affecting rates or charges for any competitive telecommunications service, then RSMo. §392.500 establishes the procedure that must be followed. Moreover, fundamental notions of due process mandate that

[15] *Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs*, CC Docket No. 01-92, September 6, 2002).

any action proposed by the Commission requires notice to the affected parties, as well as an opportunity for those parties to be heard. *State ex rel. Fischer v. Public Service Commission of Missouri*, 645 S.W.2d 39 (Mo. App. 1982). Without due process and full hearing, any unilateral action by the Commission to modify a regulated company's tariff would not withstand judicial scrutiny.

E. Are there any state or federal laws which would prohibit the Wireless Carriers from filing a landline-originated traffic termination tariff in the state of Missouri? (Tr. 1104)

The FCC prohibits CMRS providers like the Wireless Carriers from filing tariffs with the FCC. As stated in their Second Report and Order on the Implementation of Sections 3(n) and 332 of the Communications Act[16]:

> 177. Finally, in light of the fact that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates, forbearing from applying Section 203 of the Act to CMRS providers is consistent with the public interest for a number of reasons. In a competitive environment, requiring tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings. n359 Second, tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. n360 Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated, n361 since publicly filed tariffs facilitate monitoring. Third, tariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition. Finally, forbearance will foster competition which will expand the consumer benefits of a competitive marketplace. The absence

[16] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411 (1994) (*CMRS Second Report and Order*), ¶177 and 178 (footnotes omitted).

> of tariff filing requirements and the attendant notice periods should promote competitive market conditions by enabling CMRS providers to respond quickly to competitors' price changes. Carriers will be motivated to win customers by offering the best, most economic service packages. In this context, with the near-term growth of competition, it is reasonable to conclude, as required by Section 332(c)(1)(C), that forbearance at this time will "promote competitive market conditions" and will enhance competition among CMRS providers. Conversely, retaining tariffs under these conditions may limit competition. In light of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff filings from cellular carriers, as well as other CMRS providers, is in the public interest.
>
> 178. Even permitting the filing of tariffs, in the case of non-dominant carriers in competitive markets, is not in the public interest. As discussed above, we concluded that in a competitive environment, requiring tariff filings can inhibit competition. Indeed, even permitting voluntary filings would create a risk that competitors would file their rates merely to send price signals and thereby manipulate prices. n362 By refusing to accept these tariff filings we prevent carriers from hiding behind their tariffs to avoid reducing their rates. To avoid the introduction of these anti-competitive practices, to protect consumers and the public interest, and because continued voluntary filing of tariffs is an unreasonable practice for commercial mobile radio services under Section 201(b) of the Act, we will not accept the tariff filings of CMRS providers. n363 Those CMRS providers with tariffs currently on file for domestic CMRS services must cancel those tariffs within 90 days of publication of this Order in the Federal Register. [17]

VI. CONCLUSION

The Commission should dismiss Petitioners' complaints as a matter of law and based on the lack of factual support to sustain their claims. Petitioners bear the burden of proof in this consolidated complaint case to establish each and every element of their claims by substantial and competent evidence in order for the Commission to be legally justified in awarding any relief to the Petitioners. The evidence in this proceeding establishes beyond doubt that the Petitioners have completely failed to establish their burdens of proof regarding their Complaints.

[17] *See* footnote 16, *supra.*

Thus, the Commission has no recourse but to deny the relief sought by Petitioners in their Complaints. Any Order short of a complete denial of all relief sought by Petitioners in their Complaints is not supported by the substantial and competent evidence in the record and will not withstand judicial review.

Respectfully submitted,

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ATTACHMENT 1

Example 1: Ameritech Mobile Traffic Transited by SWBT to Mid-Missouri:

MOUs		327,675[1]	
Access Rate	x	$0.1245[2]	
		$40,795.54 =	Amount allegedly due applying Mid-Missouri's access charges filed with the Commission

vs.

$38,623.92[3] = Amount claimed by Mid-Missouri as being due

Since MOUs are constant, and the access rate of $0.1245 is indisputable, what rate did Mid-Missouri use in calculating amounts allegedly due and owing? THERE IS NO EVIDENCE IN THE RECORD OF THE RATE USED BY MID-MISSOURI.

Example 2: Verizon Wireless Traffic Transited by SWBT to Mo-Kan:

		2/98 – 2/01	
MOUs		215,832[4]	
Access Rate	x	$0.0948[5]	
		$20,460.87 =	Amount allegedly due applying Mo-Kan's access charges filed with the Commission

vs.

$16,837.19[6] = Amount claimed by Mo-Kan as being due

Since MOUs are constant, and the access rate of $0.0948 is indisputable, what rate did Mo-Kan use in calculating amounts allegedly due and owing? THERE IS NO EVIDENCE IN THE RECORD OF THE RATE USED BY MO-KAN.

[1] Ex. 1, Schedule 1; but see paragraph B of Section III, *supra*.
[2] Mid-Missouri's intrastate intraLATA terminating access charge; Ex. 39, Opening Schedule 1.
[3] Ex. 1, Schedule 2.
[4] Ex. 7, Schedule 1; but see paragraph B of Section III, *supra*.
[5] Mo-Kan's intrastate intraLATA terminating access charge; Ex. 39, Opening Schedule 1.
[6] Ex. 7, p.7, l. 2.

CERTIFICATE OF SERVICE

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